

DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

FILE: B-208551

DATE: January 26, 1983

MATTER OF: Inter-Con Security Systems, Inc.

DIGEST:

Where 1983 Department of Defense Authorization Act, Pub. L. 97-252, 96 Stat. 718, 852 (1982), prohibits the use of fiscal year 1983 funds for contracting out of security guard functions at military installations, protest involving Government's cost comparison under OMB Circular A-76 will be dismissed as academic.

Inter-Con Security Systems, Inc. protests the decision of the U.S. Army Missile Command, Redstone Arsenal, Alabama, to perform guard post and patrol services in-house instead of contracting out under request for proposals No. DAAH03-82-R-0022.

We dismiss the protest as academic.

Inter-Con initially challenged the Army's cost comparison for these services, made under Office of Management and Budget Circular A-76, in an administrative appeal; when this was denied by letter dated August 4, 1982, Inter-Con protested to our Office.

In response to the protest, the Army states that section 1111 of the 1983 Department of Defense Authorization Act, Pub. L. 97-252, 96 Stat. 718, 852 (1982) prohibits the use of appropriated funds to contract for the performance of security guard functions at military installations. The Army states that Redstone Arsenal is a military installation within the meaning of the statute and that the security services required are a need of fiscal year 1983. The Army concludes that it is prohibited by law from awarding this contract.

024454

We agree. Section 1111 specifically provides:

"None of the funds appropriated pursuant to an authorization contained in this Act may be obligated or expended to enter into any contract for the performance of firefighting functions or security guard functions at any military installation or facility, except when such funds are for the express purpose of providing for the renewal of contracts in effect on the date of the enactment of this Act."

Comments to Section 1111 explain that the Congress believed such critical functions as security guard services should not be turned over to private contractors and that commanding officers should maintain direct control over functions "on which the safety and security of personnel and costly facilities depend." 128 Cong. Rec. H4893-H4894 (daily ed. July 30, 1982) (Statement of Rep. Gilman). Nothing in the Department of Defense Appropriation Act for fiscal year 1983, included as if enacted as the regular appropriations act in section 101(c) of the present continuing appropriations resolution, changes this prohibition. See Joint Resolution of December 21, 1982, Pub. L. No. 97-377, § 101(c), 96 Stat. 1830, ____.

Inter-Con further argues that if the Army had calculated the cost of performing in-house correctly, it would have been shown to be more expensive than contracting out. In this case, Inter-Con believes, a contract could have been awarded before the effective date of the 1983 Authorization Act. Inter-Con maintains that acceptance of its proposal during fiscal year 1983 therefore would be appropriate since "but for" the incorrect cost study, the funds could have been obligated in fiscal year 1982.

The general rule for obligating fiscal year appropriations by contract is that the contract imposing the obligation must be made within the fiscal year sought to be charged. Department of the Treasury, Customs Service, 59 Comp. Gen. 431 (1980), 80-1 CPD 313. Specifically, 31 U.S.C. § 1501(a), as adopted by Pub. L. 97-258 (formerly 31 U.S.C. § 200(a)(1) (1976)), provides:

"(a) An amount shall be recorded as an obligation of the United States Government only when supported by documentary evidence of -

B-208551

"(1) a binding agreement between an agency and another person (including an agency) that is -

"(A) in writing, in a way and form and for a purpose authorized by law; and

"(B) executed before the end of the period of availability for obligation of the appropriation or fund used for specific goods to be delivered, real property to be bought or leased or work or service to be provided * * *." (Emphasis added.)

In the Customs Service case, our Office held that where an agency did not mail acceptance of a bid to a contractor before the end of the period of availability for obligation of one fiscal year's appropriation, no "binding agreement" arose, and therefore the following fiscal year's funds must be used. See also B-118654, August 10, 1965 (involving failure to satisfy similar statutory requirements in a negotiated procurement).

It is clear that no contract between Inter-Con or any other offeror and the Army was executed during fiscal year 1982 for the security guard services in question. Consequently, fiscal year 1982 funds were not obligated and fiscal year 1983 funds, if available, would have to be used for such services. Since they are not available, Inter-Con's protest concerning the Army's cost comparison is academic. See International Business Investments, B-209051, January 10, 1983, 83-1 CPD ____.

Finally, we note that the solicitation at page 333 clearly stated that funds were not presently available for this procurement and that the Government's obligation was contingent upon the availability of appropriated funds. Thus, offerors should have been aware that the procurement was subject to the availability of funds.

The protest is dismissed.

Harry R. Van Cleve
Harry R. Van Cleve
Acting General Counsel